opportunity for notice and comment.

Keep in mind that the ultimate benefit of a reasoned IRFA is to illicit information for policymakers from those with hands on experience in an industry that is subject to rapid change due to enhancements in technology. The Commission needs this information known only to practitioners to avoid erecting unreasonable barriers to competition.

D. Paperwork Reduction Act.

Given the Commission's incomplete regulatory flexibility analysis and its failure to look at all the compliance burdens on small entities, Advocacy has concerns regarding the accuracy of the Commission's estimates in its submission for approval of its estimates on reporting and recordkeeping requirements to the Office of Management and Budget ("OMB"). These concerns will be addressed fully in Advocacy's comments to OMB.

II. Comments In Response To The Notice Of Proposed Rulemaking.

Aside from the proposed reporting, recordkeeping, and other compliance requirements, the *NPRM* proposed or sought comment on several regulations that affect how small businesses will deploy advanced telecommunications services. The Commission covers a wide variety of topics and proposals in the *NPRM*. Advocacy submits that some of these proposals encourage the deployment of advanced telecommunications services by small businesses while others would hinder and delay that deployment. Throughout these comments, Advocacy recommends the same course to the Commission – use regulatory flexibility. Rules that are tailored to adjust to the different sizes of entities competing in the advanced telecommunications market will encourage deployment without crippling small providers of the services.

A. Commission Proposals Beneficial To Small Business Deploying Advanced Telecommunications Services.

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The Commission used regulatory flexibility principles in two of its proposed regulations in the *NPRM*. Advocacy applauds this analysis. Each of these proposals takes into account the alternatives proposed by Congress in the RFA.[63]

1. Collocators Must Only Pay For Cost Of Conditioning Space Used.

The Commission sought comment on whether CLECs should be responsible only for its share of the cost of conditioning the collocation space.[64] Advocacy supports this proposal. By limiting CLEC's cost of reimbursement to only the space used, the Commission will reduce a barrier to entry for small CLECs. This lesser rate is warranted due to the lower volume of traffic and capacity of equipment that are characteristics of small CLECs. This provision will encourage interconnection by small CLECs, which will in turn encourage the deployment of advanced telecommunications services

2. Small Collocators May Pay On An Installment Basis.

The Commission proposed in the *NPRM* to allow CLECs to pay the costs of conditioning collocation costs on an installment basis.[65] Advocacy supports this proposal but recommends a minor modification. By allowing small CLECs to pay on an installment basis, the Commission is reducing a barrier to entry for those carriers The cost of collocation can be staggering, especially considering the number of physical collocation arrangements needed for a CLEC to compete on an effective level. Installment payments will encourage rapid interconnection by small CLECs, as they would be able to afford interconnection at more central offices at one time. This increased ability to enter a larger number of central offices will increase competition and the deployment of advanced telecommunications services.

[63] 5 U.S.C. § 603(c).
[64] *NPRM*, para. 143.

Advocacy recommends that the Commission limit the use of installment payments when the CLEC is interconnecting with a small ILEC. When interconnecting with an ILEC that qualifies as a small entity, the CLEC should be required to cover the full cost of conditioning the space used by the CLEC. Advocacy believes this exception should be made for two reasons. First, a small ILEC should not be saddled with financing a small CLEC's interconnection, as the small ILEC is often of limited means itself and does not have the economies of scale to reduce costs as the large ILECs do. Second, small ILECs tend to be in rural and residential areas. Both of these areas are not immediately attractive to CLECs so an exemption here would not adversely affect competition and the deployment of advanced telecommunications services.

B. Commission Proposals Detrimental To Small Business Deployment Of Advanced Telecommunications Services.

In the course of the *NPRM*, the Commission proposed several regulations that would inhibit the ability of small businesses to deploy advanced telecommunications services. The *NPRM* suffers from "Big Guy Myopia."[66] The Commission considered the effect the regulations would have on the large companies but failed to consider the effect on small entities, while applying the rules across the industry. When regulations are applied across the industry, the Commission must weigh their effect upon small entities

1. Separate Affiliate Requirements Are Unrealistic for Small ILECs.

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[65] *Id.*

[66] Commissioner Michael J. Powell, Remarks before the Independent Telephone Pioneer Association (May 7, 1998)(transcript available at <http://www.fcc.gov/commissioners/powell>(visited Sept. 22, 1998)).

> Those of you who have heard me speak about mid-size and smaller carriers know that I think most policymakers within the Beltway suffer from what I have termed "Big Guy Myopia" -- that is, we often set policies and measure the success or failure of such policies based on the positions of the major local and long distance companies. Faced with the momentous task of setting and removing policies on a national scale, we too often rush to address the concerns of the major players and deal with the smaller players as an afterthought, if at all. We thereby overlook the many mid-size and smaller companies that are active in the marketplace.

Id.

In the *NPRM*, the Commission tentatively concluded that an ILEC may form a separate affiliate to provide data services. This separate affiliate would be exempt from the Section 251 interconnection obligations, would be presumed to be non-dominant, and would not be required to file tariffs for provision of interstate services that are exchange access.[67] The Commission proposed the separate affiliate option to encourage deployment of advanced telecommunications services. ILECs can avoid Section 251 regulation by separating out advanced services into an affiliate. This affiliate would be treated in the same manner by the ILEC as any other CLEC.[68] The Commission hopes that since the ILEC's affiliate is harmed if it discriminates against CLECs, it will be in the ILEC's economic interest to provide efficient and reasonable interconnection.

The Commission proposed a framework that would prevent the separate affiliate from deriving any unfair advantages from the ILEC and to encourage the separate affiliate to function just like an independent CLEC.[69] This framework is composed of two obligations on the part of the ILEC. First, the ILEC must satisfy adequate structural separation requirements.[70] Second, the ILEC is limited on the transfer of facilities to the separate affiliate.[71]

a. Structural Separation Requirements Are Infeasible For Small ILECs.

To meet the first obligation, the Commission proposed seven different structural separation and non-discrimination requirements. (1) The affiliate must operate independently from ILEC. The two may not jointly own switching facilities, land, or buildings, nor may they

[67] *NPRM*, para. 86.
[68] The separate affiliate would be required to request interconnection with the ILEC in the same manner as any other CLEC. Furthermore, any interconnection agreement with the affiliate would be available to independent CLECs.
[69] *NPRM*, para. 87.
[70] *Id.* para. 92.
[71] *Id.*

jointly perform operating, installation, or maintenance. (2) Transactions must be arm's length, reduced to writing, available to public inspection. Furthermore, all transactions must comply with affiliate transaction rules. (3) Incumbent and affiliate must maintain separate books, records, and accounts. (4) Incumbent and affiliate must have separate officers, directors, and employees. (5) The separate affiliate must not obtain credit using incumbent as a recourse. (6) Incumbent may not discriminate in favor of its affiliate. (7) The separate affiliate must interconnect with the incumbent pursuant to tariff or an interconnection agreement.[72] The Commission requested comment on whether the same separation requirements should apply to all advanced services affiliates regardless of size of the ILEC.[73]

In response to the Commission's request for comments, Advocacy recommends that the Commission condition the degree of structural separation necessary to the size of the ILEC. As the Commission pointed out in the *NPRM*, the purpose of the structural separation is to prevent unfair advantages given by the ILEC[74] and to ensure that affiliates lack the market power of the ILEC.[75] Small ILECs lack market power. They control a limited number of access lines, and those are vulnerable to competition by larger, more powerful competitors. A small ILEC cannot leverage its conventional voice service business to give it an advantage in advanced services. If the small ILEC were to do so, a competitor could easily come in and undercut the small ILEC's prices. A small ILEC's network is small and can be replicated with a fraction of the cost and effort needed to replicate a RBOC's network. Advocacy contends that small ILECs lack the market power to abuse a data affiliate to the same extent that the RBOCs and GTE do. Therefore, the need for strict structural separation is less for small ILECs.

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[72] *Id.* para. 96.
[73] *Id.* para. 98.
[74] *Id.* para. 87.

The seven proposed structural separation requirements are not feasible for small ILECs. In particular, small ILECs will not be able to comply with the first, second, and fourth requirements.[76] The first requirement is not feasible for small ILECs, as they have limited resources and equipment, and are incapable of creating a data affiliate that must duplicate the switching facilities of the ILEC. Furthermore, small ILECs have a small work force. Forbidding the small ILECs from providing operating, installation, or maintenance functions for the separate affiliate forces the affiliate to hire an entire new staff. Small ILECs do not have the resources to double their staff. Advocacy contends that small ILECs should be given a lower standard of operating independently. The FCC should allow small ILECs to jointly own switching facilities, land, and buildings with the separate affiliate. More importantly, the FCC should allow small ILECs to perform operating, installation, or maintenance functions for the separate affiliate for which the affiliate must reimburse the small ILEC.

Advocacy believes that the second requirement for structural separation should be modified. Although Advocacy agrees that transactions between the ILEC and the separate affiliate should be arm's length and reduced to writing, Advocacy objects to a mandate to make the agreement available on the Internet. Many small ILECs do not have Internet home pages. A recent study by Yankelovich Partners, Inc. for IBM and the U.S. Chamber of Commerce showed that approximately 25 percent of small businesses have Internet home pages.[77] Advocacy does not have exact statistics on how many small ILECs have home pages, but Advocacy believes that small ILECs most likely mirror the overall statistics for small businesses. Therefore, the Commission is requiring 75 percent of all small ILECs to obtain server space, create a Web page,

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[75] *Id.* para. 85.
[76] *Id.* para. 96.
[77] Leslie Goff, *Mom-and-Pop Businesses Go Boom on the Web*, CNN Interactive, Aug. 26, 1998 (visited Sept. 22,

and post the contracts between small ILECs and their separate affiliate. Advocacy believes this is unnecessary and has Paperwork Reduction Act and Regulatory Flexibility Act implications as well. The Commission should require these contracts to be available for public inspection, but small ILECs may present the contracts to the requesting party in any reasonable medium.

Advocacy recommends that the Commission completely remove the fourth requirement of structural separation for small ILECs. Under this requirement, no employee of the ILEC could work for the separate affiliate. The small ILEC would have to hire a complete second set of employees from the chief executive officer to the lineman. As stated previously, small ILECs do not have the resources to hire a second set of employees to duplicate functions that the current staff handles. In light of the tight fiscal restraints on small ILECs, Advocacy recommends that the Commission exempt small ILECs from meeting the fourth requirement.

b. Limitations On Transfer Of Equipment Are Infeasible For Small ILECs.

The *NPRM* tentatively concluded that any transfer of local loops from an ILEC to a separate affiliate would make the affiliate an assign and subject to Section 251 interconnection obligations.[78] However, the Commission requested comments on whether there should be a *de minimis* exception for the transfer of equipment and whether there should be a time limitation for such transfers.[79]

Advocacy believes that a *de minimis* exception for the transfer of equipment is warranted for small ILECs. The assets of a small ILEC are limited and if it decides to create a separate affiliate, the Commission should allow it to transfer equipment to where it will be the most effective. For this reason, Advocacy believes that the *de minimis* exception should be expanded

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1998) <http://www.cnn.com/TECH/computing/9808/26/mompop.idg>.

[78] *NPRM*, para. 107.

for small ILECs. Small ILECs should have the ability to transfer equipment that provides advanced telecommunications services. Furthermore, a longer time limitation for small ILECs is recommended, as they have fewer staff to manage the transfer of facilities.

c. Current Separate Affiliate Proposal Runs Counter To Regulatory Flexibility.

The structural separation requirements and limitations on the transfer of equipment as proposed in the *NPRM* effectively make the separate affiliate an impossibility for small ILECs. Small ILECs do not have the assets, resources, or staff to meet the requirements as they are currently written. Unless the Commission applies regulatory flexibility, small ILECs will only be able to provide advanced telecommunications services subject to Section 251 obligations.[80]

It is Advocacy's position that these requirements were written for the RBOCs and GTE. They are the only companies large and rich enough to support a separate affiliate. Also, they are the only companies with enough market power to warrant the strict separation requirements the FCC proposes. However, by creating a separate affiliate, large ILECs are exempted from regulations that are still applicable to small ILECs.

Advocacy also notes that the separate affiliate is not constrained to the operating region of the RBOC. The separate affiliate is free to offer service to customers in the regions of small ILECs and to do so on a non-dominant basis without interconnection obligations. Indeed, it is the small ILECs that must provide interconnection to the large ILECs. Such competition may encourage the deployment of advanced services – but the competition is one-sided. Since small ILECs cannot meet the structural separation requirements, they cannot create separate affiliates

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[79] *Id.* paras. 108, 109.

[80] As discussed above, Advocacy believes that Section 251(f) waivers for small ILECs are warranted. Without the exemptions Congress designated for their use, small and rural ILEC bear the full cost of regulation. See Section II, supra.

and are bound by Section 251 obligations. The large ILECs can offer advanced telecommunications services in small ILEC territories without making those services available for interconnection or resale, while small ILECs must do both.

Advocacy asks the Commission to consider the effect of this inverse regulatory flexibility scheme, where small businesses are regulated more stringently than large businesses. If the separate affiliate requirements are left unchanged with no exception for the different capabilities of small ILECs, the Commission will create a patently unfair situation where small businesses are restricted in their operations and growth, while large businesses are allowed to operate without those burdens. This situation, in Advocacy's opinion, warrants exemptions and reductions in regulations on small ILECs.

2. FCC Presumptions Of Feasibility Hinder Deployment Of Advanced Telecommunications Services.

a. FCC Presumption That A Collocation Arrangement Offered At One Location Is Feasible At The Other Locations Hinders Deployment Of Advanced Telecommunications Services.

In the *NPRM*, the Commission proposed if an ILEC offers a particular collocation arrangement at one premise, that collocation arrangement is presumed to be technically feasible at all ILEC premises.[81] Advocacy believes that this presumption will hinder deployment of advanced telecommunications services. Conditions differ widely from central office to central office, especially among small ILECs.[82] What is feasible at one location is not at another location, because of space, equipment available, and other factors.

ILECs will be forced only to offer collocation arrangements that they know they can meet at all locations. Collocation arrangements will be reduced to the lowest common denominator

[81] *NPRM*, para. 139.

[82] Small ILECs systems are often developed at different times and use a variety of equipment and designs to

among all the central offices. This will greatly inhibit the ability of small CLECs to interconnect, as the ILECs will only offer a limited number of collocation arrangements that are feasible at all its central offices. Advocacy recommends that the Commission allow CLECs and ILECs flexibility in determining collocation arrangements. Flexibility will encourage interconnection and speed deployment of advanced telecommunications services.

b. CLEC Requests For Feasible Method Of Unbundling Should Be Limited By Section 251(f) Exemptions.

The Commission tentatively concluded that CLECs may request any technically feasible method of unbundling and the ILEC is obligated to provide the particular method requested.[83] The ILEC has the burden to show that the requested method of unbundling is infeasible.[84] Should the ILEC demonstrate the request is not feasible, it may offer another unbundling method that provides the CLEC with a loop equal in quality and functionality to the ILEC's loop.[85] The CLEC may request other unbundling methods if the first is proven infeasible.[86]

In Advocacy's request for clarification of the *Memorandum Opinion and Order ("MO&O")*,[87] Advocacy stated that Section 251(f) exemptions should also apply to advanced telecommunications services. Advocacy believes that Section 251(f) applies to the unbundled requirement as well. For rural ILECs, the State Commission determines technical feasibility, and the rural ILEC does not have the burden of showing technical infeasibility. ILECs with fewer than 2 percent of the nation's access lines have the right to petition the State Commission for exemption, suspension, or modification of an unbundling arrangement. Advocacy believes the

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accommodate need from the ILECs customers.
[83] *NPRM*, para. 171.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *See* Section III, *infra*.

allowing rural ILECs some relief, if necessary and in the public interest, is consistent with the 1996 Act and will not harm the deployment of advanced telecommunications services.

Advocacy also recommends that the Commission require a CLEC to list all acceptable forms of unbundling at the initial collocation request. The CLEC will present them in order of preference, and the ILEC must consider them in that order (e.g. before the ILEC can agree to the second arrangement, it must show the first arrangement is infeasible.).[88] Advocacy believes that if a CLEC presents all its preferred means of unbundling at once collocation arrangements negotiations will take less time, as proposal, rejection, counter-proposal will be boiled down to one step benefiting both CLECs and ILECs.

The Commission does not explain how its conclusion that ILECs must provide interconnection at sub-loop level affects its conclusions on unbundling arrangements. In particular, Advocacy requests a clarification whether a CLEC can request any form of unbundling at the remote terminal.[89]

3. Sub-Loop Unbundling Could Create Additional Compliance Requirements And Should Be Subject To Section 251(f) Exemptions.

The Commission tentatively concluded in the *NPRM* that ILECs must provide sub-loop unbundling and permit CLECs to collocate at remote terminals unless the ILEC shows that sub-loop unbundling is not feasible or there is insufficient room at the remote terminal.[90] The Commission has applied Section 251 obligations to the sub-loop with this conclusion. As discussed above, Advocacy contends that if Section 251 obligations apply so too should Section 251(f) for small carriers.

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[88] CLEC should be able to accept at its option an lesser-preferred unbundling arrangement without the ILEC proving infeasibility of the higher ranked arrangements.
[89] *See* Section II.B.3, *infra*.
[90] *NPRM*, para. 174.

If the reporting, recordkeeping, and compliance requirements discussed in Section I are extended to include sub-loops and remote terminals, Advocacy is concerned that the regulatory burden on small entities would greatly increase. Due to the number of remote terminals used by local exchange carriers, the Commission may increase compliance requirements several fold, which would place an enormous burden on small entities. The Commission should solicit comment in a revised IRFA on the compliance burdens of this proposal and consider alternatives such as exemptions, reduced reporting requirements, and extended implementation periods to come into compliance.

III. Request for Clarification of the Memorandum Opinion and Order

In the *MO&O* portion of the FCC's decision, the Commission concluded that advanced telecommunications services are telecommunications services.[91] Furthermore, the Commission concluded that advanced services are either telephone exchange services or exchange access services.[92] Building upon these two conclusions, the Commission declared advanced telecommunications services subject to the interconnection obligations set out in Section 251 of the 1996 Act.[93] The Commission relied upon the similarities of advanced services and conventional telephone service when determining that Section 251 applied to both.[94] As the Commission points out, nothing in the statutory language or legislative history limits Section 251 to only conventional circuit-switched service.[95]

Advocacy concurs with the Commission's assessment that advanced telecommunications services are telephone access services or access exchange services and thus, Section 251

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[91] *NPRM,* para. 35.
[92] *Id.* para. 40.
[93] *Id.* para. 46.
[94] *Id.* para. 35.
[95] *Id.* para. 41.

obligations should apply. However, Advocacy believes that the entirety of Section 251 should apply to advanced telecommunications services, including the provisions for exemption, suspension, or modification under Section 251(f) for rural carriers. Congress expressly provided an opportunity for certain rural telephone companies to petition a State Commission to grant an exemption,[96] or grant a suspension, or modification for certain interconnections requirements as a means to reduce the significant economic impact on both telecommunications users and small carriers.[97]

However, the *MO&O* does not discuss Section 251(f) nor its applicability to advanced telecommunications services. Advocacy requests that the FCC address this issue in a clarification of its *MO&O* and state unambiguously that a State Commission has the authority to grant an exemption, suspension, or modification upon request of a rural ILEC for providing interconnection for advanced telecommunications if such a grant is "consistent with the public interest, convenience, and necessity."[98] Applicability of Section 251(f) is vital for the continued operation of small ILECs

Since many State Commissions have already granted exemptions to Section 251 obligations for conventional services, it is reasonable to presume that interconnection for advanced telecommunications services are also exempt since the provision of advanced telecommunications services require additional costs and facilities above that of conventional service. Advocacy hopes that State Commissions will consider an automatic extension of its grant for relief of conventional services interconnection obligations under Section 251(f) to advanced telecommunications services. It would be burdensome for a rural carrier to be required to also

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[96] 47 U.S.C. § 251(f)(1).
[97] 47 U.S.C. § 251(f)(2)(A).
[98] 47 U.S.C. § 251(f)(2)(B).

petition for advanced services interconnection relief when it has already received relief from conventional interconnection.

However, we recognize that this presumption does not work in the other direction. A State Commission deeming that conventional service Section 251 obligations are feasible does not necessarily mean that Section 251 obligations are also feasible for advanced telecommunications services. A special showing for providing advanced services may be warranted.

Advocacy also hopes that State Commissions will consider implementation of a single petition process to address both conventional and advanced interconnection as described in Section 251(f). A single petition process would reduce any administrative burdens for both rural carriers and State Commissions, increase efficiency, minimize economic burdens on small ILECs and CLECs, and encourage deployment of advanced telecommunications services by reducing the amount of time necessary to process interconnection agreements.

IV. Conclusion

The purpose of the Office of Advocacy's comments in this proceeding are threefold. Advocacy addresses issues in the Commission's Initial Regulatory Flexibility Analysis, *Notice of Proposed Rulemaking*, and *Memorandum Opinion and Order*.

First, Advocacy believes the Commission failed to meet the statutory requirements of the Regulatory Flexibility Act, as amended, by its (1) failure to identify properly and undertake an analysis of all classes of small entities affected by the proposed regulations; (2) failure to describe adequately the proposed reporting, recordkeeping, and other compliance requirements contained in the *NPRM*; and (3) failure to consider alternatives to minimize significant economic burdens the proposed regulations would place on all small entities. Therefore, Advocacy strongly recommends that the Commission revise and re-submit the IRFA for public notice and comment as the only means to cure these severe deficiencies.

Second, Advocacy supports the Commission's proposals that collocators must only pay for cost of conditioning space used and small collocators may pay on an installment basis. However, Advocacy recommends that the Commission use regulatory flexibility to temper the separate affiliate requirements and the limitations on the transfer of equipment. Advocacy is opposed to the proposals that create a presumption that a collocation arrangement offered at one location is feasible at the other collocations. Advocacy also believes that CLEC requests for a feasible method of unbundling at the central office and the remote terminal should be limited by Section 251(f) exemptions.

Finally, Advocacy respectfully requests the Commission to issue a clarification of its *Memorandum Opinion and Order* to make explicit that Section 251(f) exemptions, suspensions, and modifications also apply to advanced telecommunications services.

The Commission should recognize, as intended by the RFA, that a reasoned analysis in the IRFA will allow the FCC to reach the desired effect with the large ILECs, while not overburdening the small ILECs and CLECs. Regulatory flexibility analyses are a powerful tool. Advocacy encourages the FCC to utilize it in this proceeding for the benefit of the public interest, convenience, and necessity

Respectfully submitted,

Jere W. Glover, Esq
Chief Counsel for Advocacy

S. Jenell Trigg, Esq.
Assistant Chief Counsel for
Telecommunications

Eric E. Menge, Esq.
Assistant Chief Counsel for
Telecommunications

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